

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RONALD KUIPER and
CONLEY KUIPER,

No. C06-4009-MWB

Plaintiffs,

Sioux City, Iowa
February 24, 2009
8:30 a.m.

vs.

GIVAUDAN FLAVORS CORP.,

VOLUME 6 OF 12

Defendant.

/

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MARK W. BENNETT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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1 (Proceedings reconvened outside the presence of the
2 jury.)

3 THE COURT: Good morning. Ready to have the jury
4 brought in?

5 MR. MCCLAIN: We are.

6 MR. PAGLIARO: Yes, Your Honor.

7 THE COURT: Okay. And what's the plan?

8 MR. MCCLAIN: Finish Higley.

9 (The jury entered the courtroom.)

10 THE COURT: Thank you. Please be seated.

11 Members of the jury, we're going to be continuing with
12 this deposition. I just wanted to give you a heads-up that, as
13 you know, tomorrow will be our last day this week. And we're
14 going to just go till two o'clock tomorrow, so we'll be breaking
15 at two tomorrow. Thank you.

16 Ready to proceed with the deposition?

17 MR. MCCLAIN: Yes, sir.

18 THE COURT: Okay. Thank you.

19 (Continued videotaped deposition excerpts of Nancy
20 Higley taken April 6, 2006, were played in open court.)

21 MR. MCCLAIN: Your Honor, we're going to go to the
22 videotaped deposition of Dr. Lockey that the jury's heard so
23 much about. Maybe while we're switching over if they --

24 THE COURT: Sure. Why doesn't everybody take a
25 stretch break. Thank you.

1 And how long will this deposition be?

2 MR. MCCLAIN: It's -- we cut about a half hour of it
3 out last night, and I think it's around 2 hours and 15 minutes
4 or so roughly.

5 THE COURT: Okay. Thanks. Well, in about 40 minutes
6 or so, why don't we take another stretch break.

7 MR. MCCLAIN: Okay.

8 THE COURT: Thank you. Please be seated.

9 (Videotaped deposition excerpts of James Lockey taken
10 August 11, 2006, were played in open court.)

11 MR. MCCLAIN: You asked to stop this at about 40
12 minutes.

13 THE COURT: Yes. Thank you. Everybody take a stretch
14 break. Thank you.

15 Thank you. Please be seated.

16 MR. MCCLAIN: And, Your Honor, do you want to stop at
17 ten again to take our break? Is that what your --

18 THE COURT: Yes, that'd be good, or we can go 30
19 minutes, until 10:10.

20 MR. MCCLAIN: Okay.

21 THE COURT: Thank you.

22 (Continuation of videotaped deposition.)

23 MR. MCCLAIN: Your Honor, this is a good place to stop
24 for our break.

25 THE COURT: Okay. That's fine. Members of the jury,

1 we'll be in recess until 10:25 -- I'm sorry, 10:35. Please
2 remember to keep an open mind till you've heard all of the
3 evidence. Thank you.

4 (The jury exited the courtroom.)

5 THE COURT: Counsel, anything we need to take up?

6 MR. MCCLAIN: No, sir.

7 MR. PAGLIARO: No, Your Honor.

8 THE COURT: Okay. Thank you.

9 MR. PAGLIARO: Thank you, Your Honor.

10 (Recess at 10:07 a.m.)

11 THE COURT: Ready for the jury?

12 MR. MCCLAIN: We are.

13 MR. PAGLIARO: Yes, Your Honor.

14 THE COURT: Okay. Thank you.

15 (The jury entered the courtroom.)

16 THE COURT: Thank you. Please be seated.

17 (Continuation of videotaped deposition.)

18 MR. MCCLAIN: Your Honor, is this a good time --

19 THE COURT: Sure, good time for a stretch break.

20 Thank you.

21 Thank you. Please be seated.

22 (Continuation of videotaped deposition.)

23 THE COURT: Would now be a good time to take the break
24 before we get --

25 MR. MCCLAIN: There's about five minutes, Your Honor.

1 Should we --

2 THE COURT: Okay. Why don't we keep going then.
3 That's fine.

4 (Continuation of videotaped deposition.)

5 MR. MCCLAIN: There's eight pages left of text. Do
6 you want us to just take it up after lunch?

7 THE COURT: Yes, I'd like to take -- I'd like to give
8 the jury a break now.

9 MR. MCCLAIN: Okay.

10 THE COURT: Okay, members of the jury. It's about
11 12:15. We'll have a 25-minute recess until 12:40. And remember
12 to keep an open mind till you've heard all of the evidence in
13 the case. Thank you.

14 (The jury exited the courtroom.)

15 THE COURT: Please be seated for one minute. I'm
16 going to give the lawyers a little homework assignment over our
17 break. You know, I don't profess to have much knowledge about
18 products liability law. I think this is only the second
19 products case I've had in my 14 1/2 years. But it seems to me
20 that there's a concept we use fairly often in criminal law
21 called willful blindness, and it goes to the issue in the
22 instructions on page 15 about whether Givaudan knew or
23 reasonably should have known. And that's the standard we use in
24 criminal law for a lot of offenses. And there's a willful
25 blindness instruction that's kind of a stock instruction in the

1 criminal law that basically says you can't avoid knowledge by
2 sticking your head in the sand when a reasonable person would
3 have made the effort to figure out what's going on.

4 And, of course, I'm going to figure out whether that
5 applies in a products case or not, but I'd be interested to know
6 if the lawyers know or if you've seen any case on it. Of
7 course, it would depend upon whether the plaintiff wanted an
8 instruction. I don't want to gum things up for the parties by
9 injecting my views.

10 But it seems to me that there's sufficient evidence in
11 the record that would support a willful blindness type
12 instruction on knowledge if that's an acceptable thing to
13 instruct on, and on that I have no opinion because I just don't
14 know.

15 MR. MCCLAIN: There are some cases on this issue. We
16 will find them.

17 THE COURT: Okay. Thanks. We'll see you back here at
18 12:40. Thank you.

19 (Recess at 12:16 p.m.)

20 THE COURT: Ready to have the jury brought in?

21 MR. MCCLAIN: Sure. Before -- just so that you know,
22 the line of cases that you're asking about begins with Borel
23 versus Fibreboard, a Fifth Circuit case that holds that a
24 manufacturer is held to be an expert in the field and must be
25 aware of all scientific evidence. And the extensions have been

1 from that to you can't willfully put your head in the sand, and
2 I'm having people do the research right now. We should have at
3 least some cases to give you by the end of court today and
4 tomorrow too.

5 THE COURT: That's fine. Thanks.

6 (The jury entered the courtroom.)

7 THE COURT: Please be seated. I'll dim the lights.

8 (Continuation of videotaped deposition.)

9 MR. MCCLAIN: That's the -- that's the end of
10 Dr. Lockey's testimony. And we would -- are you ready to go a
11 little bit, Ron? Would you like to go a little bit right now?
12 We would like to continue with Mr. Kuiper's testimony for a few
13 minutes.

14 THE COURT: That's fine.

15 MR. MCCLAIN: And then we will play John Hallagan's
16 testimony which will probably consume the rest of the afternoon.

17 THE COURT: Okay. Thank you.

18 RONALD KUIPER, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

19 THE COURT: Mr. Kuiper, you're still under oath, so
20 I'm not going to have to swear you in each time. Thank you.

21 Yes, you can be seated, Mrs. Kuiper, right next to
22 your husband. Thank you.

23 CONTINUED DIRECT EXAMINATION

24 BY MR. MCCLAIN:

25 Q. Good afternoon, Mr. Kuiper.

1 A. Hi. Good afternoon.

2 MR. MCCLAIN: Good afternoon, ladies and gentlemen.

3 Q. When we broke yesterday, Mr. Kuiper, we were talking about
4 Kevin's birth and the sequence around that.

5 MR. MCCLAIN: And would you go back to that for a
6 moment?

7 Q. And I didn't really have a chance to ask you about this,
8 but I think it's an important thing.

9 MR. MCCLAIN: Would you go back to the original
10 picture.

11 A. Me?

12 Q. I'm talking to Scott.

13 MR. MCCLAIN: No, the picture of Audrey and the kids.

14 A. Okay.

15 Q. Now --

16 A. Okay.

17 Q. Right here. Now, I know that this is painful, but the jury
18 needs to understand in terms of evaluating some of the things
19 that you've lost because of this illness, some of your -- some
20 of your personal history, Ron.

21 A. Uh-huh.

22 Q. Your son died in a tragic accident, didn't he?

23 A. It was electrical accident.

24 Q. And he died --

25 A. Electricity.

1 Q. How old was he?

2 A. He was 14.

3 Q. And that was one of the biggest regrets of your life.

4 A. Yes.

5 Q. And it's something that you live with every day.

6 A. That's right.

7 Q. But when Kevin came along, you got another chance to have a
8 boy to do some of the things that you'd always hoped to be able
9 to do; am I right?

10 A. That's right.

11 Q. And so Kevin was kind of a special gift that God gave you
12 in your view --

13 A. Uh-huh.

14 Q. -- to have another chance.

15 A. Uh-huh.

16 Q. To have a son.

17 A. Right.

18 Q. And so your marriage to Connie was a real blessing as you
19 look at it and particularly because it gave you another son.

20 A. That's right.

21 Q. And you had always hoped to be able to do all the things
22 that you were too busy to do the first time around.

23 A. That's right.

24 Q. And so one of the great things you looked forward to in
25 regard to Kevin was all of the physical activities, the learning

1 to do all the physical activities that you'd always hoped to be
2 able to do.

3 MR. PAGLIARO: Objection. Leading.

4 THE COURT: Sustained. Can you rephrase the question,
5 please?

6 BY MR. MCCLAIN:

7 Q. Tell the jury, would you, some of your aspirations, I mean,
8 when Kevin was born how you looked forward to doing things with
9 him.

10 A. Well, he was a real healthy child. And growing up with
11 him, he was real meek. He was -- paid attention. He was
12 never -- never crossed me or anything, so he was a real good kid
13 as far as I was concerned.

14 Q. And were you -- were you a healthy guy at this point in
15 time?

16 A. Oh, yes.

17 Q. And this -- back in this time?

18 A. Oh, yes, I was. I was working my -- I think I started the
19 paper route about that time too, and I was working the paper
20 route in the morning or evenings, and a lot of times I'd put him
21 in the truck and he'd go with me.

22 Q. So -- and was it about this time that you began to work at
23 Jolly Time?

24 A. In '85 I went to work for Jolly Time. He was just not very
25 old.

1 Q. And you were working another job? You had a paper route at
2 the time?

3 A. Yes, yes, delivering newspapers every morning.

4 Q. So during that time how many hours a day were you working?

5 A. Well, I was working from three in the morning till probably
6 seven at night.

7 Q. And you were -- were you able to do it and keep up that
8 kind of pace?

9 A. Oh, yeah, I was able to do it.

10 Q. And play with Kevin at night?

11 A. Well, some, but I never got as much done as I should have I
12 guess.

13 Q. But you had quite a bit of energy during this time.

14 A. Sure, sure, I had plenty.

15 Q. And when you went to work at Jolly Time back in '85, what
16 job did you have?

17 A. Well, I was just doing janitor work at the start when they
18 put me down there. Then later on the guy that was doing the
19 janitor work, he left, and so then they -- or excuse me. The
20 guy that was doing the oil room left, and so I had -- they asked
21 me if I wanted to go in there. I says, "Well, I'll try it."

22 Q. Just to be clear, when I said in opening that you were the
23 first oil mixer, that wasn't right. You were the second oil
24 mixer.

25 A. Yes, right.

1 Q. And so you took over from him in the oil mixing room.

2 A. Yes.

3 Q. And did that involve mixing the butter flavors up?

4 A. Yes.

5 Q. And during that time period that you started doing that
6 work at Jolly Time, I guess that was what? Around '91 or '92?

7 A. I got into the oil room in -- yeah, that was about right.

8 Q. Okay. Now, let's talk about the time before you got into
9 the oil room, though, Ron. What -- you were a janitor first.
10 Did you ever work in the corn areas?

11 A. Yes.

12 Q. What did you do out there?

13 A. I helped them shell -- in the fall of the year I helped
14 them put the ear corn away in the cribs, and then when we got
15 that done, they wanted shelled popcorn to package. But us guys
16 outside had to get it ready for them.

17 Q. Okay. And was that a dusty job?

18 A. Yes, it was.

19 Q. And would you cough when you worked around that?

20 A. Some. I would do that during -- you know, on the weekend.
21 It didn't last very long.

22 Q. Okay. So but when you were in that dusty environment you
23 would cough.

24 A. Oh, yes.

25 Q. And from time to time were you short of breath?

1 A. Well, not that much there. It didn't bother me much there
2 because I was -- I wasn't exposed to a lot of things, you know.

3 Q. Okay. But whatever the symptoms were, whether it was
4 coughing and some shortness of breath, would those always clear
5 up when you got out of that dusty environment?

6 A. Yes.

7 MR. PAGLIARO: Objection. Leading.

8 THE COURT: Sustained.

9 BY MR. MCCLAIN:

10 Q. Tell us whether or not whatever those symptoms were from
11 the corn dust, whether they were permanent or temporary.

12 A. They were just temporary.

13 Q. Okay. Now, does that -- and you did that for a number of
14 years?

15 A. Yes, uh-huh.

16 Q. And tell us about the circumstances of how you were asked
17 to go into the mixing room.

18 A. Well, they were just starting out there, and they had a
19 desperate situation and they needed someone to do it, and I
20 didn't even realize what I was going to be getting into. But I
21 feel they'd guide me on my way, so I went. I wanted to get some
22 little extra money, so I just took it on.

23 Q. All right. Tell me about this. Were the folks at Jolly
24 Time good folks to work for?

25 A. Oh, beautiful. They took good care of their employees. As

1 long as you --

2 Q. They really took care of their employees? Is that what you
3 just said?

4 A. Oh, yes. As long as you were there, you were going to have
5 a job.

6 Q. And so when they asked you to take over in the mixing room,
7 did you consider that to be a promotion?

8 A. I really did because I thought I'd learn something and get
9 something good out of it.

10 Q. And so you were willing to do it.

11 A. Oh, yes.

12 Q. Now, up until that time in '91, '92 when you went into the
13 mixing room, did you have good energy, Ron?

14 A. Yeah, I had good energy. I could pick up 50-pound bags of
15 salt and throw them around.

16 Q. Were you able to work two jobs up until that point?

17 A. Oh, yes, yeah, I could. That wasn't a problem.

18 Q. Getting up at three in the morning for the paper route?

19 A. Yeah.

20 Q. And work till seven at night.

21 A. Yeah.

22 Q. And then still did you have energy for Kevin on the
23 weekends?

24 A. Well, not really too much, but we had a lot of help, you
25 know. We had my two children that were not that old yet, and he

1 had -- and we had quite a bit of activity at that time.

2 Q. Still a lot of activity with your older kids and Kevin --

3 A. Right.

4 Q. Was it an active family?

5 A. Right.

6 Q. And did you notice before you went to work in the oil room
7 of having any permanent kind of health effects?

8 A. Well, I didn't really know, no. I just -- I didn't know
9 anything until later in the years.

10 Q. Now, let me just be clear. When you were away from the
11 corn shelling operation, would all those symptoms clear up?

12 A. Oh, yes, yes, yeah.

13 Q. So on the weekends and other times --

14 A. Sure.

15 Q. -- you were fine.

16 A. Sure.

17 Q. Now -- all right. Then tell us about the oil mixing
18 experience that you had. When you went in there, did you have
19 any idea that, number one, that butter flavor contained a
20 chemical called diacetyl?

21 A. No, no.

22 Q. So is it fair to say you had no idea --

23 A. No.

24 Q. -- that diacetyl had any kind of health effects because you
25 didn't even know it was in there?

1 A. No.

2 Q. And did you have any idea in general that butter flavor
3 could be hazardous?

4 A. No, I didn't either.

5 Q. Ron, were you making food?

6 A. Yes.

7 Q. And did you think that if it was food it was safe?

8 A. That's right.

9 Q. And so did you have any sense that this was a hazardous job
10 in any way?

11 A. That's right.

12 Q. Did you know it was a hazardous job?

13 A. Well, not really that much until later.

14 Q. Okay. Later on that became . . .

15 But --

16 MR. PAGLIARO: Objection to that statement, Your
17 Honor.

18 THE COURT: Overruled.

19 BY MR. MCCLAIN:

20 Q. Now, did the people at Jolly Time as you called it -- you
21 called American Pop Corn Jolly Time.

22 A. Yeah.

23 Q. It's on a street called One Fun Place; right?

24 A. Yes.

25 Q. Yeah. Did the people at Jolly Time give you directions

1 about how to work safely in that mixing room?

2 A. Not really. They were more concerned about the salt than
3 they were anything else.

4 Q. That's what I mean.

5 A. Yeah.

6 Q. I mean, they gave you directions about wearing a mask.

7 A. Yes.

8 Q. When you were working around salt.

9 A. Right.

10 Q. As far as you knew, was salt the only issue that you needed
11 to wear a respirator around?

12 A. Yes, that's what I felt.

13 Q. All right. And so you did.

14 A. Yes.

15 Q. So you did whenever you were around salt.

16 A. That's right.

17 Q. And, you know, I guess because there was salt in the room
18 most of the time you wore a respirator most of the time.

19 A. That's right.

20 MR. PAGLIARO: Objection. Leading.

21 THE COURT: Sustained.

22 BY MR. MCCLAIN:

23 Q. Tell the jury when you were wearing a respirator then in
24 the room. Was it just infrequently? Was it, you know,
25 sometimes, or was it most of the time?

1 A. Most of the time is when you -- because the biggest job was
2 to get the salt in there. You had to scrub it through a screen
3 to get it to go through the screen, and that took quite a bit of
4 time. Then we always had to put four bags, six bags in it, in
5 that oil.

6 Q. Now, did you have any idea, Ron, that just lifting up the
7 lids to -- well, first of all, tell us what the process was of
8 mixing up the butter flavor into a mixture. What were the steps
9 involved?

10 A. Well, you had -- it came in a five-gallon bucket.

11 Q. Five-gallon bucket.

12 A. Yes, and you had to take the lid off and then stir it a
13 little bit to get everything stirred in.

14 Q. What was in there -- what was in there when you would open
15 it up?

16 A. That was the flavoring that was put in -- the butter
17 flavoring or whatever.

18 Q. Was there oil in there already?

19 A. Yes, yes.

20 Q. Was there salt in there already?

21 A. No, there was no salt in there.

22 Q. Okay. But there would be heated oil. And would you then
23 pour the buckets of --

24 A. Yes.

25 Q. -- butter flavor into those big containers?

1 A. Right.

2 Q. And during the process that you were pouring, would you be
3 wearing a mask?

4 A. No, I wasn't required to wear one. I didn't think there
5 was anything wrong. I thought it was food.

6 Q. And so when you were in the mixing room, generally you had
7 a mask on is what you said; right?

8 A. Till we got the salt in.

9 MR. PAGLIARO: Objection. Leading.

10 THE COURT: Well, I think it was just foundational for
11 the next question.

12 MR. MCCLAIN: It is.

13 BY MR. MCCLAIN:

14 Q. But when you were actually pouring the buckets in, you
15 didn't know to wear a mask then.

16 A. No.

17 Q. Now, did you ever have to clean the tanks out after -- you
18 know, from time to time when you were done with a shift or at
19 the end of a week or how long --

20 A. Every --

21 Q. What was the frequency of cleaning the tanks out?

22 A. Every Friday afternoon.

23 Q. And at that point in time were you mixing anything up?

24 A. No.

25 Q. You would just be cleaning up.

1 A. Right, right.

2 Q. And when you were cleaning up those tanks, was there butter
3 flavor residue in there?

4 A. I would think so, yes, if I'd have known that.

5 Q. Okay. And during that time, did you wear a mask?

6 A. No, I didn't because I just didn't -- I wasn't told that it
7 was anything that was bad for me.

8 Q. And what would you do to clean up during that time period?
9 How would you go about cleaning it up?

10 A. Well, the oil that was left in the line that they had been
11 processing was -- put air on and blow it out, blow that out of
12 the line. And after we got that blowed out, then we'd switch
13 and run hot water in the line.

14 Q. Okay. Just hot water.

15 A. Hot water and soap and let that circulate for a while, get
16 the pipes heated up again. And then when that was done, why,
17 then we'd blow the water out.

18 Q. Okay. Now, when this was getting heated up, could you
19 smell butter again?

20 A. No, not that much.

21 Q. Okay. But it would be heated up with water in those tanks.

22 A. That's right.

23 Q. And did you know to wear a mask during that time?

24 A. No, I didn't wear a mask because I figured it was -- it was
25 all food.

1 Q. Now, when did you first -- when did you first start
2 noticing, Ron, that you were having permanent shortness of
3 breath?

4 A. Well, it was back in -- probably in '0 -- latter part of
5 '05, '06 in there that I began to get bronco -- bronchitis.

6 Q. Now, you said '05. Did you mean '95?

7 A. Yes. '95.

8 Q. '95, just a few years after you started in there.

9 A. Yes.

10 Q. That's what the medical records kind of said, so I -- so in
11 '95, what did you notice?

12 A. Well, my doctor, my doctor even said, why, he says, "Your
13 lungs are so bad," he says, "You're going to have to quit and
14 get out of there," so . . .

15 Q. Did you know what was causing it at that time?

16 A. No, I didn't have no idea.

17 Q. Was the doctor even -- did the doctor tell you that it was
18 butter flavor?

19 A. No, he didn't.

20 Q. Did that ever even enter your mind at the time that it was
21 butter flavor?

22 A. I didn't think there was anything wrong with it.

23 Q. But you just didn't -- did you have the physical stamina at
24 that point to stay in the mixing room lifting those buckets and
25 the other things you had to do?

1 A. No.

2 Q. So let's be clear. When you started in the mixing room,
3 you could lift those five-gallon buckets?

4 A. Yeah.

5 Q. How many of them a day would you lift?

6 A. Oh, it was -- probably depend on what we were doing that
7 day, but sometimes we mixed three different flavors at the same
8 time.

9 Q. Okay.

10 A. And so some of it was buckets, probably five or six. And
11 then we had some hundred-pound boxes that the cheese, cheese
12 popcorn was made with, and it had to be put up on the platform
13 and get them dumped in to the mix too.

14 Q. And then how about the bags of salt? How many of those
15 would have to be lifted?

16 A. Well, on average of 6 of them in a big batch of 300
17 gallons.

18 Q. And how heavy were those?

19 A. They were 50-pound bags.

20 Q. And when you went into the mixing room, were you healthy
21 enough to do all that?

22 A. Oh, yes, yes.

23 Q. But by '95, could you lift all that stuff?

24 A. Not without having problems at that time.

25 Q. Okay. And were you short of breath all the time?

1 A. Well, a great deal of the time when I was working there I
2 was, so I was beginning to wonder what was going on.

3 Q. Okay.

4 MR. MCCLAIN: Your Honor, this is a good point to
5 stop --

6 THE COURT: Okay.

7 MR. MCCLAIN: -- with this for right now.

8 THE COURT: That's fine. You may step down,
9 Mr. Kuiper. Thank you.

10 Why doesn't everybody take a stretch break. Thank
11 you.

12 Thank you. You may be seated.

13 MR. MCCLAIN: This, Your Honor, is the testimony of
14 John Hallagan who was the director of FEMA who the jury has
15 heard about.

16 THE COURT: Thank you.

17 (Videotaped deposition excerpts of John Hallagan taken
18 June 25, 2008, were played in open court.)

19 THE COURT: Would now be a good time to take a stretch
20 break?

21 MR. MCCLAIN: Sure.

22 THE COURT: Thanks.

23 Thank you. Please be seated.

24 (Continuation of videotaped deposition.)

25 THE COURT: Would now be a good time to stop?

1 MR. MCCLAIN: Yeah, I think it would be a good time to
2 stop.

3 THE COURT: Okay. Members of the jury, that is going
4 to conclude the evidence for today. Please remember to keep an
5 open mind till you've heard all of the evidence. Remember our
6 schedule tomorrow. We'll start at 8:30, but you'll be going
7 home at 2:00. So we'll see you tomorrow morning. Thank you.

8 (The jury exited the courtroom.)

9 THE COURT: Please be seated for a second. I've
10 already looked at some law. They don't call it willful
11 blindness, but I've read that Fifth Circuit case, and there's
12 actually some similar language from some Iowa Supreme Court
13 cases.

14 So I'm going to work on a small supplemental
15 instruction, and I'll have it to you -- I don't know if I'll
16 have it to you tomorrow, but I'll have it to you on Monday. I'm
17 not saying I'm going to give it. I'm just saying I'm going to
18 work on it.

19 I'm also working on a modification to the punitive
20 damage instruction as it relates to the "specifically targeted
21 at the plaintiff" language. But I'm still toying with that
22 so . . .

23 MR. PAGLIARO: Your Honor?

24 THE COURT: Yes.

25 MR. PAGLIARO: You'll allow us to submit something on

1 that --

2 THE COURT: Oh, absolutely, yeah, yeah. I just
3 thought I'd give you my first cut, and then you can -- I think
4 it's kind of easier to -- for me to put it out there and then
5 all of you to take shots at my work than it is to get cross
6 stuff from each party and then we have to try and put it
7 together, and that's exactly why I send you my instructions
8 early. So absolutely. I haven't made up my mind at all. It's
9 just something I'm looking at. It kind of triggered when I was
10 listening to the evidence.

11 Anything else we need to take up?

12 MR. MCCLAIN: No, Your Honor. I think we'll be fairly
13 close to being done if not completely done tomorrow with our
14 evidence. I think that we're going to -- the only question is
15 how much of this is left I guess. It will be close.

16 THE COURT: Okay. Well, remember, they are going to
17 cross-examine the plaintiff.

18 MR. MCCLAIN: Yeah, but it won't be very long.

19 THE COURT: We'll see about that. Anything else we
20 need to take up?

21 MR. PAGLIARO: Nothing from us, Your Honor. Thank
22 you.

23 THE COURT: Thank you. We'll see you tomorrow
24 morning. Thank you.

25 MR. PAGLIARO: Thank you, Your Honor.

1 (The foregoing trial was
2 adjourned at 2:31 p.m.)
3
4

5
6 CERTIFICATE

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.
9

10
11 s/ Shelly Semmler 3-26-09
12 Shelly Semmler, RMR, CRR Date
13
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